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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
)  
Competitive Telecommunications Association )  
Florida Competitive Carriers Association And )  
Southeastern Competitive Carriers Association )  
)  
Petition on Defining Certain Incumbent LEC )  
Affiliates As Successors, Assigns, Or )  
Comparable Carriers Under Section 251(h) )  
Of The Communications Act )

CC Docket No. 98-39

To: The Commission

COMMENTS OF BELL SOUTH CORPORATION

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## TABLE OF CONTENTS

	<u>Page</u>
Summary .....	ii
Introduction.....	1
The Petition Is Really a Late-filed Petition for Reconsideration of the <i>Non-Accounting Safeguards Order</i> .....	2
The Petition Is Factually Wrong In Its Characterization of BellSouth BSE, Inc. And Its Relationship To BellSouth Telecommunications, Inc. ....	7
BSE Is Not A “Successor or Assign” of BST.....	14
There Is No Basis For Denominating BSE As A Dominant Carrier .....	18
There Is No Basis For The Commission To Adopt A Rule That BSE or Like CLECS Are Comparable Carriers .....	19
Conclusion .....	22
Exhibit 1 .....	23

## SUMMARY

The petitioners seek a declaratory ruling that “an ILEC affiliate that operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC’s region will be considered a ‘successor or assign’ of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act” and that such a Competitive Local Exchange Carrier (“CLEC”) affiliate will be “treated as a ‘dominant carrier’ for the provision of interstate service.” Alternatively, the petitioners ask for “a rule establishing a rebuttable presumption that an Incumbent Local Exchange Carrier (“ILEC”) affiliate that provides wireline local exchange or exchange access service within the ILEC’s service areas under the same or a similar brand name is a ‘comparable’ carrier under Section 251(h)(2).”

The Petition is really a late filed petition for reconsideration of determinations the Commission made over one year ago in CC Docket No. 96-149. It contains factually inaccurate allegations concerning BellSouth’s CLEC, BellSouth BSE, Inc. (“BSE”); and it mischaracterizes the cases petitioners cited in support of their “successor or assign” argument. In these Comments, BellSouth demonstrates that there is no basis for denominating BSE as a dominant carrier, as requested by petitioners. The request for initiation of a rule making to establish criteria for assessing whether an ILEC is a comparable carrier is also without foundation.

The petition is nothing more than a thinly veiled attempt to reverse decisions reached by state public service commissions which have found that CLECs such as BSE, are in the public interest and enhance competition, and to slow down Bell operating companies in their efforts to obtain authority, under section 271 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §271 (1997), to provide in-region interLATA services.

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To: The Commission

COMMENTS OF BELL SOUTH CORPORATION

BellSouth Corporation ("BellSouth"), on behalf of itself and its effected affiliates, by its attorneys, in response to the Commission's Public Notice DA 98-627, released April 1, 1998, hereby respectfully submits comments in opposition to the captioned filing by Competitive Telecommunications Association ("CompTel"), Florida Competitive Carriers Association ("FCCA") and Southeastern Competitive Carriers Association ("SECCA") (collectively, the "petitioners"). For the reasons set forth below, Petitioners' filing should be dismissed.

**Introduction**

The petitioners seek a declaratory ruling that "an ILEC affiliate that operates under the same or a similar brand name and provides wireline local exchange or exchange access service within the ILEC's region will be considered a 'successor or assign' of the ILEC under Section 251(h)(1)(B)(ii) of the Communications Act" and that such a Competitive Local Exchange Carrier ("CLEC") affiliate will be "treated as a 'dominant carrier' for the provision of interstate

service.”<sup>1</sup> Alternatively, the petitioners ask for “a rule establishing a rebuttable presumption that an Incumbent Local Exchange Carrier (“ILEC”) affiliate that provides wireline local exchange or exchange access service within the ILEC’s service areas under the same or a similar brand name is a ‘comparable’ carrier under Section 251(h)(2).”<sup>2</sup>

As demonstrated below, the Petition is a late filed petition for reconsideration of determinations the Commission made over one year ago in another proceeding; it contains factually inaccurate allegations concerning BellSouth’s CLEC, BellSouth BSE, Inc. (“BSE”); and it mischaracterizes the cases petitioners cited in support of their “successor or assign” argument. Furthermore, the petition is nothing more than a thinly veiled attempt to reverse decisions reached by state public service commissions which have found that CLECs such as BSE, are in the public interest and enhance competition, and to slow down Bell operating companies (“BOCs”) in their efforts to obtain authority, under section 271 of the Communications Act of 1934, as amended (the “Act”), 47 U.S.C. §271 (1997), to provide in-region interLATA services.

**The Petition Is Really A Late-filed Petition For Reconsideration  
Of The *Non-Accounting Safeguards Order*<sup>3</sup>**

The Petition should be dismissed as a late filed petition for reconsideration of the Commission’s findings in the *Non-Accounting Safeguards Order*. In that proceeding, the

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<sup>1</sup> Petition for Declaratory Ruling or, in the alternative, for Rulemaking, filed by the petitioners on March 23, 1998 (the “Petition”), at 2.

<sup>2</sup> *Id.*

<sup>3</sup> *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (“*Non-Accounting Safeguards Order*”).

Commission developed a substantial record that, in part, addressed the ability of an ILEC affiliate to offer local exchange and exchange access services, the safeguards regarding such offerings under the Act, and the Commission's assessment of the need for any additional safeguards beyond those imposed by the Act. The Commission, after an extensive review of the record, determined that the provisions in the Act, that applied solely to BOCs, anticipated creation of BOC affiliates whose purpose would be to provide local exchange and exchange access services.<sup>4</sup> Indeed, AT&T and MCI, in their comments in CC Docket No. 96-149, acknowledged that section 271(g)(1) of the Act permits BOC affiliates to market local exchange and exchange access services,<sup>5</sup> and AT&T even advocated limiting the affiliates' provision of exchange services to resale, which it argued was the only means by which the affiliates could meet the joint marketing provisions of section 272(g) of the Act.<sup>6</sup> Petitioners, one of who was a party to that proceeding, did not seek reconsideration of those findings.

In Section VIII of the *Non-Accounting Safeguards Order*, the Commission specifically considered the conditions under which BOC affiliates that provide local exchange and exchange access services might become successors and assigns of the BOC. Based upon its conclusions in CC Docket No. 96-149 in paragraphs 309-311, at 22054-55, the Commission adopted section

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<sup>4</sup> See, e.g., *Non-Accounting Safeguards Order*, *supra* n.3, at 22055 ("section 272 does not prohibit a Section 272 affiliate from providing local exchange service" and "a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) solely because it offers local exchange services"), and 22056 ("no basis in the record of this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(c) merely because it is engaged in local exchange services" and "section 251 does not preclude section 272 affiliates from obtaining resold local exchange service pursuant to section 251(c)(4) and unbundled elements pursuant to section 251(c)(3)").

<sup>5</sup> See *Non-Accounting Safeguards Order*, *supra* n.3, at 22053.

<sup>6</sup> See AT&T Comments in CC Docket No. 96-149, filed Aug. 15, 1996, at 19-22.

53.207 of its rules which provides that a BOC affiliate becomes an assign under section 3(4) of the Act “[i]f a BOC transfers to [it] ownership of any network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) of the Act.” However, the Commission further concluded that the same affiliate is not a successor or assign “solely because it obtains network elements from [its related] BOC pursuant to section 251(c)(3) of the Act.”<sup>7</sup>

The Commission next addressed the combination of services a BOC affiliate could obtain and offer.<sup>8</sup> It found, among other things, that “a BOC affiliate should not be deemed an incumbent LEC subject to the requirements of section 251(c) of the Act solely because it offers local exchange services; rather, section 251(c) applies only to entities that meet the definition of an incumbent LEC under section 251(h).”<sup>9</sup> The Commission, also in paragraph 312, stated it found “no basis in the record in this proceeding to find that a BOC affiliate must be classified as an incumbent LEC under section 251(h)(2) merely because it is engaged in local exchange services.”<sup>10</sup> Section 251(h)(2) of the Act details how a local exchange carrier can be determined by the Commission, by rule, to be a “comparable carrier.”

These findings demonstrate that the Commission correctly concluded that the regulatory status of an affiliate is determined by the functions and capabilities it possesses, not simply its affiliation. Petitioners would have the Commission ignore its prior determinations and make

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<sup>7</sup> Section 53.207 of the Commission’s rules.

<sup>8</sup> See *Non-Accounting Safeguards Order*, *supra* n.3, at 22055-58.

<sup>9</sup> *Id.*, at 22055.

<sup>10</sup> *Id.*, at 22056.

ILEC status an “inherited characteristic” which it is not. Only if the affiliate performs the functions of an ILEC does it become one. The Commission even went so far in assuring that these distinctions were maintained as to preclude states from imposing incumbent status on LECs that did not meet the definition of an ILEC. The Commission stated “we conclude that states may not unilaterally impose on non-incumbent LECs obligations the 1996 Act expressly imposes only on incumbent LECs.”<sup>11</sup> Because incumbency is not an inherited quality, the Commission has already correctly concluded that an ILEC affiliate may become a CLEC in order to provide local exchange services.

In addition, the Commission found that allegations of anticompetitive activity in which such affiliates might engage to be “speculative” and “unpersuasive”.<sup>12</sup> The Commission concluded that, directly contrary to the logic of the instant petition, allowing affiliates of BOCs to offer local exchange and exchange access services would encourage introduction of new and innovative services and would be in the public interest.<sup>13</sup>

The Commission released its decision in CC Docket No. 96-149 on December 24, 1996-- more than a year ago. Petitioners are asking the Commission to revisit those findings. They have attempted to dress up their late-filed petition for reconsideration with incorrect allegations about BSE. Their mischaracterizations about BSE are projected not only onto BSE, but also onto other CLECs affiliated with ILECs, regardless of their structure or attributes. CompTel, and many of its members were parties in CC Docket No. 96-149, and as such, were aware that the

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<sup>11</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, 11 FCC Rcd 15,499, at 16,110 (1996), *modified on reconsideration*, 11 FCC Rcd 13042 (1996), *vacated in part*, *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8<sup>th</sup> Cir. 1997), *cert. granted sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 118 S.Ct. 879 (1998).

<sup>12</sup> See *Non-Accounting Safeguards Order*, *supra* n.3, at 22057.

<sup>13</sup> *Id.*



Commission made these determinations. Yet, CompTel and its cohorts now seek reconsideration of the foregoing findings in the *Non-Accounting Safeguards Order*. This barely disguised petition for reconsideration should be rejected for what it is—late-filed. Section 1.106(f) of the Commission’s rules requires that a petition for reconsideration “shall be filed within 30 days from the date of public notice of the final Commission action.” Section 1.4(b)(1) specifies that the public notice date for a document in a notice and comment rule making is the date of publication in the Federal Register. The *Non-Accounting Safeguards Order* was published in the Federal Register on January 21, 1997.<sup>14</sup> The petition is untimely and should be dismissed on that basis alone.

The Petitioners also waited until eighteen state commissions had reviewed and approved CLEC certificates for ILEC affiliates that would operate within and beyond the franchised territory of the ILEC. Three such decisions, in Alabama, Georgia and South Carolina involve the BellSouth CLEC, BSE. In addition, there have only been two instances (involving GTE in Michigan and Texas) in which the ILEC affiliated CLEC could not operate within the ILEC’s territory. In Texas, the state commission based its decision on a unique Texas statute that apparently prohibited one corporation from holding multiple certificates in the same territory. In Michigan, where the commission has certified Ameritech, GTE’s certificate was conditioned upon GTE meeting specific requirements of an arbitration decision. The Petitioners have had ample notice that ILEC’s affiliates were becoming CLECs since, as described in Exhibit 1, the grants of certificates go back several years in some instances.

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<sup>14</sup> See 62 FR 2927 (1997).

Petitioners cannot cite any situation where an ILEC affiliate acting as a CLEC has gained any type of unfair competitive edge. They also ignore all the safeguards that are in place to assure that such an affiliate has no unfair advantage. For example, the ILEC is required to treat affiliates and non-affiliates in a nondiscriminatory manner. Further, with the most favored nation provisions found in interconnection agreements, if any CLEC affiliate were able to negotiate a more favorable agreement with the ILEC, the terms of that agreement would be available to any other CLECs. Another example is the resale requirements of section 251(b) of the Act, applicable to all local exchange carriers. As a reseller of ILEC services, any attempt by the affiliated CLEC to sell its retail services below its costs would result in all other CLECs having this lower priced service available to them. Needless to say, the CLEC affiliate would be losing money with each such transaction.

**The Petition Is Factually Wrong In Its Characterization Of  
BellSouth BSE, Inc. And Its Relationship To BellSouth  
Telecommunications, Inc.**

The petitioners assert that activity as innocuous as the sharing of a common brand causes “affiliation” as defined in the Act to be broadened to encompass the definition of a “successor or assign.” Petitioners allege that an ILEC affiliate that wins customers away from its affiliated ILEC even through resale of the ILEC’s services, becomes an ILEC by operation of such success. In sum, Petitioners argue that an ILEC affiliate should be judged a successor or assign simply by virtue of what it is, not by what it does. The Commission has already rejected this logic and has concluded that an ILEC affiliate only becomes subject to the specific ILEC requirements of the Act if it employs network facilities to provide unbundled network elements

in place of the ILEC.<sup>15</sup> As described above, eighteen state commissions have certified ILEC affiliates as CLECs. In no instance has a state commission either imposed ILEC status on the affiliate, or limited the CLEC affiliate's ability to use the corporate brand name.

Petitioners argue that ILECs, like BellSouth Telecommunications, Inc. ("BST"), are creating CLECs, like BSE, to avoid interconnection and resale obligations imposed on ILECs by section 251 of the Act.<sup>16</sup> Of course, such a conclusion would mean that these companies would be brazenly violating every ILEC requirement of the Act. Petitioners never offer any explanation as to why ILECs would attempt such a course of action in view of the certainty of regulatory and legal penalties, fines and other remedies to which they would be subject. In particular, to assert that a BOC, such as BST, would consider such a course of action when it is required to establish that its local markets are open to competition, in order to qualify under Section 271 of the Act to provide in-region interLATA services, defies common sense. The only support for this wild accusation is petitioners' allegation that in state proceedings, BellSouth witnesses have admitted: (1) that BSE is owned ultimately by BellSouth Corporation which also owns BST; (2) that BSE will use the "same corporate name, logo and indicia of corporate identity as [BST] without paying [BST] or its ratepayers anything for this use of corporate goodwill;"<sup>17</sup> (3) that BellSouth Corporation is funding BSE which thereby "will have access to the same capital and borrowing power as [BST], secured in substantial part by the assets and expected future earnings of [BST];"<sup>18</sup> and (4) that "high-level staff members, including some who had responsibility for

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<sup>15</sup> See Section 53.207 of the Commission's rules.

<sup>16</sup> 47 U.S.C. §251 (1997).

<sup>17</sup> Petition, at 5.

<sup>18</sup> *Id.*

negotiating interconnection agreements with independent CLECs, have been transferred from [BST] to [BSE].<sup>19</sup>

BellSouth will address each of these contentions in turn. BellSouth agrees with (1) above. BSE is a wholly owned subsidiary of BellSouth BSE Holdings, Inc., which, like BST, is a wholly owned subsidiary of BellSouth Corporation. However, common ownership of an ILEC and a CLEC has no impact on an ILEC's obligations under the Act. Petitioners' second contention is simply not correct. Either petitioners are trying to obfuscate the facts or they have no regard for what the facts are. As BSE witness Robert Scheye stated in the testimony transcript references relied upon by petitioners, BSE will present itself to customers as BellSouth BSE or adopt a marketing brand name. However, it will not market itself as BellSouth Telecommunications; rather, BSE will use the BellSouth brand name and logo.<sup>20</sup> The name "BellSouth" is BellSouth Corporation's property.<sup>21</sup> When BellSouth Corporation was incorporated in Georgia on October 13, 1983, BST's predecessors in interest, Southern Bell Telephone and Telegraph Company ("Southern Bell") and South Central Bell Telephone Company ("South Central Bell"), were owned by American Telephone and Telegraph Company ("AT&T"). Since its formation, BellSouth Corporation has authorized its various direct and

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<sup>19</sup> *Id.*

<sup>20</sup> See Tennessee Regulatory Authority Docket No. 97-07505, Transcript of Proceeding, Apr. 9, 1998, Testimony of Robert C. Scheye ("TRA Scheye Testimony"), at tr. 27.

<sup>21</sup> Congress anticipated the possibility that the entity that controls a BOC might own various names, trademarks and service marks when it specified separate affiliate requirements in the event a BOC or its affiliate wanted to enter the electronic publishing business. Section 274(b)(6) of the Act prohibits the BOC's electronic publishing separated affiliate or joint venture from using the name, trademarks, or service marks of an existing BOC except if such are owned by the entity that owns or controls the BOC.

indirect subsidiaries to use its name and brand at no cost. Indeed, BellSouth authorized the use of the name BellSouth by both BellSouth BSE, Inc. and BellSouth Telecommunications, Inc. Neither BSE nor BST was treated deferentially in that regard, each got BellSouth as part of its name at no cost.

Petitioners suggest that BST's ratepayers deserve some payment for the goodwill in the name. The name was not the BST ratepayers' name to give. Instead, it is BellSouth Corporation's right to authorize its use. Any number of subsidiaries were authorized to use the name BellSouth long before BST, *e.g.*, BellSouth Advertising and Publishing Corporation in 1984, BellSouth Mobility Inc in 1984, BellSouth International, Inc. in 1984, and BellSouth Enterprises, Inc. in 1985. It was not until December 31, 1991, when the merger of Southern Bell, South Central Bell and BellSouth Services resulted in BellSouth Telecommunications, Inc., that the name BellSouth was directly associated with the ILEC operations of BellSouth. Indeed, BST continued to market all of its telephone services under the Southern Bell and South Central Bell brand names and logos for several more years before extending the BellSouth brand in October 1995 to its local exchange service offerings. Any goodwill attached to the BellSouth brand name was earned by BellSouth Corporation and its unregulated subsidiaries. BST's ratepayers have neither a legal nor an equitable claim to that goodwill.

One can also speculate on what the comments would be if BellSouth's CLEC indicated that it was going to market under a name and logo not identified with BellSouth. It is not unheard of in the telecommunications industry to have a company offer a service either unbranded or through a brand not identified with the corporate parent. By identifying its CLEC

as a BellSouth affiliate, BellSouth will be competing through product differentiation and will not be attempting to win customers by claiming to be some type of off-brand. For example, BSE will be offering integrated packages of local exchange, long distance (when authorized), wireless and other services. Additionally, it will be able to meet the needs of business customers with locations beyond the traditional nine state area in which BST operates.

Petitioners are similarly incorrect in their third claim that attributes to BSE access to BST's capital and borrowing power. The very record upon which they purport to rely belies their assertions. Before the South Carolina Public Service Commission, BSE witness Robert Scheye stated: "BSE is a start-up Company and as such will rely upon the financial qualifications of its ultimate parent, BellSouth."<sup>22</sup> Mr. Scheye did not testify that BSE would have access to BST's capital and borrowing power. Indeed, BellSouth uses BellSouth Capital Funding Corporation ("BCFC"), a wholly-owned subsidiary of BellSouth, to raise financing in the form of debt for its subsidiaries other than BST, but including those BST subsidiaries whose operations are not subject to tariff regulation.<sup>23</sup> BST independently raises public debt only for its

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<sup>22</sup> See South Carolina Public Service Commission ("SCPSC") Hearing #9703 at Tr. 12, Tr. 57-58 ("Q. Look at page 4 of your testimony, if you will please. And this has already been addressed, briefly, by Mr. Hoefer but you state that BSE - this is at line 9 - BSE is the start-up company and as such will rely on financial qualifications of the ultimate parent of BellSouth? A. Yes. Q. To what extent are you dependent on BellSouth Corporation at this point? A. Right now, I'm fully dependent since we have no revenue. Q. Now, and again I'm not going to reiterate all this, but you'll agree that, based on your conversation with Mr. Hoefer, you couldn't take funds directly from BellSouth Telecommunications under the limitations of the Telecommunications Act, could you? A. I wouldn't take funds from BST irrespective of the Telecom Act because they're a separate company. I wouldn't get funds from them. I would get it from my parent, BellSouth Corporation."); and Alabama Public Service Commission ("ALPSC") Docket No. 26192, at Tr. 16 ("Q. Does the applicant [BSE] have adequate access to the capital necessary to provide the proposed services? A. Yes, we do. . . . Q. If necessary, can the applicant seek financial assistance from the parent company? A. Yes, we can.")

<sup>23</sup> See BellSouth Capital Funding Corporation, \$727,265,000 Debt Securities Prospectus, dated July 22, 1997 ("Prospectus"), at 3.

own needs. But BCFC makes it clear to holders of its debt securities that they will not have recourse to the assets or stock of BST.<sup>24</sup> Thus, petitioners' allegation regarding BSE's access to capital through BST is wrong.

As to the petitioners' fourth contention, it is at best exaggeration and irrelevant. The transcript references in footnote 10 of the Petition are to Mr. Scheye's testimony in the Alabama and South Carolina proceedings in which BSE was seeking certification as a CLEC. Mr. Scheye stated that while employed at BST he was involved in negotiating interconnection agreements with CLECs. Furthermore, contrary to petitioners' claims, there was neither inquiry about nor testimony concerning the previous job responsibilities of other former BST employees now working for BSE. Regardless, Mr. Scheye testified that, at the time, BSE employed fewer than twenty people and about one half of that group has come from BST.<sup>25</sup> Hiring of fewer than ten of BST's 57,000 employees by BSE hardly constitutes a "shift of human capital."

Petitioners, in reliance on their gross mischaracterization of the facts surrounding BSE, BST and the relationship each has with BellSouth Corporation, would have the Commission believe that "important resources, such as corporate goodwill, financing, and human capital," are being shifted from BST to BSE, making BSE indistinguishable from BellSouth and BST.<sup>26</sup>

Based on their distortion of the facts, petitioners seek a declaratory ruling or a rule that ILEC affiliated CLECs like BSE will be classified as dominant ILECs and have the same resale and interconnection obligations of ILECs. However, the actual record established in numerous state certification proceedings is that BSE has been established by the shareholders of BellSouth

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<sup>24</sup> "[N]o holder of the Securities will have recourse to or against the stock or assets of [BST]." Prospectus, at 1 and 3.

<sup>25</sup> See TRA Scheye Testimony, at tr. 31.

<sup>26</sup> Petition, at 6.

Corporation to pursue a business plan, which is separate and distinct from the ILEC operations. Based on the record, every state commission that has reached a decision has concluded that BSE should be certificated as a CLEC, not as an ILEC. Similarly, this Commission should reject the petitioners tortured logic as an ill-considered attempt to broaden substantially the statutory definition of an ILEC.

BellSouth acknowledges that an ILEC affiliate could be or become an ILEC (or be declared as comparable to an ILEC) if it met the characteristics of an ILEC. Similarly, if a non-affiliate took on these same characteristics, it could be declared to be an ILEC. The determination that an entity is an ILEC is not premised upon its affiliation with an existing ILEC. As can be shown by a description of BellSouth BSE's operations, it meets all the standards of a CLEC and not those associated with ILECs.

BSE is a fully separate subsidiary of BellSouth Corporation, which is currently seeking CLEC certification in twenty-one (21) states, including the nine southeastern states in which the incumbent, BST, operates. Ten state commissions, including the three "in region" states of Alabama, Georgia and South Carolina, have already granted BSE statewide CLEC certification. The eleven remaining requests are pending final rulings by the respective state regulatory bodies. BSE intends initially to resell ILEC local exchange services and may transition to the use of unbundled network elements. No network facilities that would be used in the provision of unbundled network elements by the ILEC have been transferred to BSE from BST, nor are any such transfers envisioned. Indeed, no network elements of any sort have been transferred. BSE will interface with all ILECs, including BST, using the identical operational support systems as all other CLECs. BSE's operational relationship with the ILECs, including BST, will be through negotiated agreements or statements of generally available terms and conditions, if available.



BSE has negotiated and signed several agreements and continues its negotiations in other instances. These attributes clearly define a CLEC, not an ILEC. If ILEC status was imposed on BSE, it would have no way to meet the Act's requirements. BSE would have nothing that it could unbundle, it would have no ability to collocate, and, as a purchaser of resold services, it could not financially offer these services at a wholesale discount and expect to stay financially solvent.

Clearly, BSE is a CLEC and at the same time an affiliate of an ILEC. Attempting to claim such an entity could be either a successor or assign, or be comparable to an ILEC, as the Petitioners have done, is completely unfounded. As is discussed in more detail in the following sections, the specific meaning of successor/assign and comparable carrier, which, if applicable to any affiliate or non-affiliate, would make it an ILEC, have no applicability to BellSouth's CLEC. Absent such findings, BSE is simply an "affiliate" of BST as such term is defined in the Act.<sup>27</sup>

#### **BSE Is Not A "Successor Or Assign" of BST.**

Petitioners argue that there is regulatory uncertainty about what a CLEC like BSE is under section 251(h) of the Act. However, to them that section of the Act is clear; it compels a ruling that "an affiliate to which an ILEC has *transferred anything that would be of value in providing in-region local service*, such as brand name, capital, or personnel, should be treated as a 'successor or assign.'"<sup>28</sup> The petitioners assert their proposed standard is a logical next step

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<sup>27</sup> See 47 U.S.C. §153(1) (1997).

<sup>28</sup> Petition, at 11 (emphasis added). Earlier in the Petition, brand name, capital and personnel are characterized as "significant attributes of the ILEC." Petition, at 9.

from what the Commission did in *Non-Accounting Safeguards Order*, referring to that part of the order in which the Commission found that the transfer to a BOC affiliate of network elements that must be provided on an unbundled basis makes the affiliate a successor or assign.

Extrapolating, petitioners penultimately argue that the mere use of the same or similar brand names by an ILEC and its CLEC affiliate without any further connection or linkage in their businesses warrants the imposition of section 251(h)(1)'s successor or assign obligations on the CLEC affiliate.<sup>29</sup> Finally, in this regard, petitioners ask this Commission to conclude that any ILEC affiliate that receives anything of value from the ILEC should also be treated as a dominant carrier for purposes of its provision of interstate services by virtue of the petitioners' belief that any successor or assign of an ILEC has market power.<sup>30</sup>

Once again, the Commission has already addressed the successor or assign issue in section 53.207 of its rules. There, and in the text of the *Non-Accounting Safeguards Order*, the Commission draws a distinction between an ILEC and its affiliate.<sup>31</sup> An affiliate of an ILEC becomes an ILEC only if it takes on the essential attribute of an ILEC by having ownership of "network elements that must be provided on an unbundled basis pursuant to section 251(c)(3) of the Act."<sup>32</sup> Thus, the breadth of the definition has been considered, the Commission has acted and petitioners have failed to seek reconsideration in a timely fashion; the matter should be concluded. Nevertheless, these arguments will be addressed.

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<sup>29</sup> Petition, at 11. Petitioners carry this further by asking that the Commission create a rebuttable presumption that an ILEC affiliate is a successor or assign if it is offering local exchange or exchange access service on a wireline basis in the ILEC's service area and "uses any corporate or brand names that are the same of similar to those of the ILEC affiliate." Petition, at 11-12, n.25.

<sup>30</sup> Petition, at 12-13.

<sup>31</sup> See, e.g., *supra* n.5.

<sup>32</sup> See Section 53.207 of the Commission's rules.

Section 251(h)(1) of the Act states that “a person or entity” becomes an ILEC if it is a “successor or assign” of an ILEC. This section was added to the Act with the enactment of the Telecommunications Act of 1996.<sup>33</sup> There is no legislative history to elucidate what Congress meant by “successor or assign.”<sup>34</sup> In those situations, the courts look to the Commission’s interpretation of its enabling statute to insure it is “reasonable” and “a permissible construction of the statute.”<sup>35</sup>

Petitioners suggest that certain Supreme Court cases concerning the National Labor Relations Act<sup>36</sup> are supportive of their analysis. BellSouth disagrees.

Petitioners posit that their cited Supreme Court cases support the proposition that

[a] corporate affiliate that is under common ownership and/or control of a company, using the same base of employees and/or resources, and providing the same services in the same geographic area as that company, will be treated as a “successor” or “assign” to that company, and subject to certain of the company’s legal obligations.<sup>37</sup>

In support thereof, petitioners cite the Commission to *Fall River Dyeing & Finishing Corp. v. NLRB*, 428 U.S. 27, 43-46 (1987) (“*Fall River*”), and *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 170-72, 183 n.5 (1973) (“*Golden State*”). As will be shown, the cases do not aid petitioners.

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<sup>33</sup> See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §151 *et seq.*

<sup>34</sup> See H.R. Rep. No. 104-458, at 123 (1996).

<sup>35</sup> See *Chevron, U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, *rehearing denied*, 468 U.S. 1227 (1984).

<sup>36</sup> 29 USC §151 *et seq.*

<sup>37</sup> Petition, at 9-10 (footnote omitted).

These cases address whether the purchaser of an enterprise is a “successor” for purposes of the National Labor Relations Act.<sup>38</sup> Among its powers, the National Labor Relations Board (“NLRB”) has authority to impose orders that apply to an “offending employer’s successors and assigns who have acquired the business as a means of evading” a Board order.<sup>39</sup>

The Supreme Court in *Fall River* agreed with the approach taken in earlier cases when it found that the determination of “successor” is focused on “whether there is ‘substantial continuity’ between the [predecessor and the succeeding] enterprises.”<sup>40</sup> The Court delineated the factors that the NLRB examines such as:

whether the business of both employers is essentially the same;  
whether the employees of the new company are doing the same  
jobs in the same working conditions under the same supervisors;  
and whether the new entity has the same production process,  
produces the same products, and basically has the same body of  
customers.<sup>41</sup>

Citing *Golden State, supra*, at 184, the Court stated that “[i]n conducting its analysis, the Board keeps in mind the question whether (those employees who have been retained will understandably view their job situations as essentially unaltered.)

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<sup>38</sup> The standard for analyzing whether an entity is a successor or assign under corporate law is a less stringent one than under the labor law standard. For example, under corporate law, the purchasing company may continue the same business and not be a successor or assign. The relevant analysis is “whether there is a continuation of the corporate entity of the seller—not whether there is a continuation of the seller’s business operation.” *Grand Laboratories, Inc. v. Midcon Labs of Iowa*, 32 F.3d 1277, 1282-83 (8<sup>th</sup> Cir. 1994), citing *Bud Antle, Inc. v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11<sup>th</sup> Cir. 1985). As shown below, under neither the corporate law nor the more exacting labor law standard could BSE be considered a successor or assign of BST.

<sup>39</sup> See *Golden State, supra*, at 177; see also 29 USC §160(c) (1997).

<sup>40</sup> *Fall River, supra*, at 43.

<sup>41</sup> *Fall River, supra*, at 43.

The businesses of BST and BSE are not essentially the same. BSE will operate in a broader geographical territory than BST. BSE will operate outside the BST service territory. BSE will operate primarily on a resale basis or through use of unbundled network assets, whereas BST is solely a facilities based carrier. Thus, BSE and BST have fundamentally different production processes. BST's market includes any customers interested in local exchange service while BSE's focus will be a mixture of businesses and residential customers who are interested in integrated packages and a single multi-state supplier. BSE will compete with BST and other CLECs for customers, it does not "share" customers with BST. BST and BSE share no employees, officers or directors and have much different management structures. BST operates in the marketplace and will continue to do so. Therefore, BSE has not replaced BST in the marketplace in any sense. Thus, BSE fails in every element of the "successor or assign" test articulated by the Court in *Fall River*.

### **There Is No Basis For Denominating BSE As A Dominant Carrier**

After declaring BSE to be a successor or assign under their construct of the statute, petitioners want CLECs like BSE to be treated as dominant carriers in their provision of in-region interstate services, such as interstate access. Their rationale is that the CLEC will be offering these services on a "near-monopoly basis" that is "indistinguishable from" its ILEC affiliate.<sup>42</sup>

BSE is an affiliate of BST; it is not a successor or assign. Moreover, every service BSE offers, at least initially, will be through the resale of BST's services,<sup>43</sup> which services BST is

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<sup>42</sup> Petition, at 12-13.

<sup>43</sup> See TRA Scheye Testimony, at tr. 29-30.

required to make available to other carriers on a non-discriminatory basis.<sup>44</sup> Furthermore, BSE enters the market with no customers, no facilities and no ability to charge other than market prices. It is patently absurd to suggest that BSE meets any reasonable standard for “dominance” in the marketplace. Clearly, common sense alone brings one to the conclusion that a reseller like BSE has no market power. Petitioners simply are trying to eliminate the competition that BSE and other CLECs will bring to the market by unnecessarily burdening them with the artificial handicap of the obligations imposed on dominant carriers. The Petition reflects purely the self-interest of CompTel’s, SECCA’s and FCCA’s members, not the public interest.

**There Is No Basis For The Commission To Adopt A Rule That  
BSE Or Like CLECs Are Comparable Carriers.**

If all else fails, petitioners want the Commission to initiate a rule making proceeding to set forth criteria by which to judge if an affiliate of an ILEC is a comparable carrier under section 251(h)(2) of the Act. Petitioners suggest that the rule should be that an ILEC related entity will be a comparable carrier if it “provides local service in the same geographic area as the ILEC and the ILEC has transferred *anything of value*, including brand names, financial resources, or human capital, to the affiliate.”<sup>45</sup>

Section 251(h)(2) of the Act is entitled “Treatment of Comparable Carriers as Incumbents” and it states,

The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section—

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<sup>44</sup> See Section 251 of the Act, 47 U.S.C. §251 (1997).

<sup>45</sup> Petition, at 13 (footnote omitted) (emphasis added).

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by the carrier described in paragraph (1) [an ILEC];

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.<sup>46</sup>

There is no legislative history concerning the origin of this provision of the Act.<sup>47</sup>

Petitioners argue that BSE is a “comparable carrier” because it “is not only comparable, but virtually identical, to the position occupied by” BST,<sup>48</sup> and it will have substantially replaced BST with respect to customers it has taken away using resources BST has transferred to BSE. Petitioners claim that the public interest component in subsection (C) would be met if ILECs were prevented from using entities like BSE to avoid resale obligations.

Under petitioners’ theory, by hiring one BST employee, BSE would become an ILEC, which would cause BSE, as a reseller and with no customers or facilities, to occupy “a position in the market” comparable to BST’s, and to have “substantially replaced” BST.

BST has more than 22 million customer access lines; BSE has none. BST has billions of dollars invested in a ubiquitous local exchange network in the area it serves; BSE has no network whatsoever. As noted above, the Commission already has determined that the provision of local exchange and exchange access services by an affiliate of an ILEC does not make the affiliate an ILEC.<sup>49</sup>

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<sup>46</sup> 47 U.S.C. §251(h)(2) (1997).

<sup>47</sup> See H.R. Rep. No. 104-458, at 123 (1996).

<sup>48</sup> Petition, at 14.

<sup>49</sup> See *Non-Accounting Safeguards Order*, *supra* n.3, at 22055-56.

The Commission also determined in its analysis of affiliates that the creation of such ILEC affiliates would be in the public interest because the ability of the affiliate to provide local and long distance services would lead to new and innovative services.<sup>50</sup> There are now several companies that are approved in eighteen states (if one limits this to ILEC affiliates that are certified CLECs in the same area as the ILEC) that are attempting to provide new services and capabilities to customers. Petitioners again are trying to modify, albeit too late, these companies abilities to operate solely on the strength of its mantra of same brand, logo and human capital, and a strained, if not absurd, reading of the Act.

The Commission is warranted in rejecting petitioners' invitation to initiate the rule making as proposed.

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<sup>50</sup> *Id.*, at 22057.



### **Conclusion**

For the reasons stated herein, BellSouth respectfully submits that the Commission should dismiss the Petition, which is nothing more than a late filed petition for reconsideration.

Petitioners have recklessly mischaracterized the facts concerning BellSouth BSE, Inc. and its relationships with BellSouth Corporation and BellSouth Telecommunications, Inc. Petitioners have failed to demonstrate that BSE is a successor or assign of BST. Their arguments do not justify dominant carrier treatment for BSE, a potential reseller with no customers. There is no reason demonstrated why the Commission should initiate a rule making to establish criteria for judging which entities or persons are comparable carriers under section 251(h)(2) of the Act.

Respectfully submitted,

BELLSOUTH CORPORATION

A handwritten signature in dark ink, appearing to read "William B. Barfield", is written over a horizontal line.

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